

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:23-CR-13 JCM (BNW)

Plaintiff(s),

ORDER

v.

RICHARD WHITTAKER,

Defendant(s).

Presently before the court is defendant Richard Whittaker (“defendant”)’s motion *in limine* to exclude the government’s proposed rebuttal expert or, in the alternative, for a *Daubert* hearing. (ECF No. 72). The government filed a response in opposition to defendant’s motion *in limine*. (ECF No. 76).¹

Also before the court is the government’s motion to seal Exhibit 1 to its response in opposition to defendant’s instant motion. (ECF No. 78).

I. Background

On January 31, 2023, a federal grand jury returned an indictment charging defendant with failing to update his sex offender registration in violation of 18 U.S.C. § 2250(a). (ECF No. 1 at 1). The indictment states that defendant, who was convicted of rape in Arkansas in 1993, traveled

¹ Although LCR 12-2 is silent on the permissibility of filing a reply to a motion *in limine*, LR 16-3 elucidates that reply briefs “will be allowed only with leave of the court.” LR 16-3. The court extends this interpretation to LCR 12-2, especially considering the time-sensitive nature of the case, as calendar call is set for February 21, 2024.

1 in interstate commerce and *knowingly* failed to register or update a registration as required by the
2 Sex Offender Registration and Notification Act (“SORNA”). (*Id.* at 1-2) (emphasis added).

3 Defendant filed a notice of intent to introduce expert evidence relating to mental disease
4 on June 30, 2023. (ECF No. 19). On August 17, 2023, defendant filed an expert notice identifying
5 Dr. Sharon Jones-Forrester (“Dr. Jones-Forrester”) as his expert witness. (ECF No. 29).

7 The expert notice indicated that defendant’s expert would testify that defendant’s
8 “symptoms would prevent him from completing registration requirements and legal tasks on this
9 [sic] own,” and that defendant “will likely need assistance complying with legal requirements and
10 daily tasks.” (*Id.* at 5). Defendant supplemented his expert notice with two reports authored by
11 Dr. Jones-Forrester. (ECF Nos. 29-3; 29-4). Trial is scheduled for February 26, 2024. (ECF No.
12 62).

14 On November 14, 2023, the court denied the government’s motion *in limine* to exclude the
15 opinions of Dr. Jones-Forrester. (ECF No. 53). In its ruling, the court reasoned that her testimony
16 was essential to determine whether defendant’s alleged dementia caused him to fail to update his
17 sex offender registry knowingly. (*Id.* at 5). Additionally, the court found that defendant would
18 suffer prejudice if the court granted the government’s motion to exclude Dr. Jones-Forrester, as
19 doing so would foreclose his entire defense. (*Id.* at 6).

21 Subsequently, the government filed an expert notice for Dr. Peifeng Hu (“Dr. Hu”), a
22 geriatrician who plans to testify that Dr. Jones-Forrester did not properly diagnose defendant with
23 dementia and that the cognitive level that defendant demonstrated during the relevant time period
24 was not consistent with someone suffering from severe dementia. (ECF No. 76 at 2). Accordingly,
25 Dr. Hu concludes that any cognitive defect was insufficient to prevent defendant from registering
26 as a sex offender. (*Id.*).

1 On January 29, 2024, defendant filed a motion to exclude Dr. Hu, arguing that his proposed
2 testimony is irrelevant and he is not qualified to opine on the issues of geriatric medicine and
3 dementia. (ECF No. 72 at 3-11).

4 As explained, *infra*, the testimony of the government’s rebuttal expert is crucial in helping
5 the jury determine whether defendant knowingly committed the charged offense, as he suffers
6 from dementia. Furthermore, his testimony is relevant, and he is sufficiently qualified to opine on
7 the issues of geriatric medicine and dementia.
8

9 II. Legal Standard

10 A. Motions in limine

11 “The court must decide any preliminary question about whether . . . evidence is
12 admissible.” Fed. R. Evid. 104. Motions *in limine* are procedural mechanisms by which the court
13 can make evidentiary rulings in advance of trial, often to preclude the use of unfairly prejudicial
14 evidence. *United States v. Heller*, 551 F.3d 1108, 1111-12 (9th Cir. 2009); *Brodit v. Cambra*, 350
15 F.3d 985, 1004-05 (9th Cir. 2003).
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17 “Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the
18 practice has developed pursuant to the district court’s inherent authority to manage the course of
19 trials.” *Luce v. United States*, 469 U.S. 38, 41 n.4 (1980). Motions *in limine* may be used to
20 exclude or admit evidence in advance of trial. *See* Fed. R. Evid. 103; *United States v. Williams*,
21 939 F.2d 721, 723 (9th Cir. 1991) (affirming district court’s ruling *in limine* that prosecution could
22 admit impeachment evidence under Federal Rule of Evidence 609).
23

24 Judges have broad discretion when ruling on motions *in limine*. *See Jenkins v. Chrysler*
25 *Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002); *Trevino v. Gates*, 99 F.3d 911, 922 (9th Cir.
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1 1999) (“[t]he district court has considerable latitude in performing a Rule 403 balancing test and
 2 we will uphold its decision absent clear abuse of discretion.”).

3 “[I]n *limine* rulings are not binding on the trial judge [who] may always change his mind
 4 during the course of a trial.” *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000); *accord Luce*,
 5 469 U.S. at 41 (noting that *in limine* rulings are always subject to change, especially if the evidence
 6 unfolds in an unanticipated manner).

8 B. Expert testimony

9 If scientific, technical, or other specialized knowledge will assist the trier of fact to
 10 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
 11 knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion
 12 or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the
 13 product of reliable principles and methods, and (3) the witness has applied the principles and
 14 methods reliably to the facts of the case. Fed R. Evid. 702.
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16 The district court serves a gatekeeper function in evaluating scientific testimony. *Daubert*
 17 *v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). When a district court is faced with a proffer
 18 of scientific testimony, it must make a preliminary determination under FRE 702 whether the
 19 reasoning or methodology underlying the testimony is scientifically valid. *Id.* at 592-93. A key
 20 question to be answered in determining whether a theory or technique is scientific knowledge that
 21 will assist the trier of fact will be whether it can be tested. *Id.* at 593.
 22

23 The objective of this gatekeeping requirement is to ensure the reliability and relevancy of
 24 expert testimony. It is to make certain that an expert, whether basing testimony upon professional
 25 studies or personal experience, employs in the courtroom the same level of intellectual rigor that
 26 characterizes the practice of an expert in the relevant field. *See Kumho Tire Co. v. Carmichael*,
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1 526 U.S. 137, 152 (1999). This gatekeeping requirement applies not only to scientific testimony,
 2 but also to all expert testimony covered by FRE 702. *Id.* at 147-49.

3 The trial court has the role of keeping out expert testimony that is not relevant and has
 4 broad latitude in exercising this function. *Cooper v. Brown*, 510 F.3d 970, 942 (9th Cir. 2007).
 5 The court, as the proponent of evaluating whether an expert's testimony is relevant, should not
 6 limit its consideration to the strength or existence of the expert's opinion. *See United States v.*
 7 *Rahm*, 993 F.2d 1405, 1411 (9th Cir. 1993). Instead, the ultimate consideration is whether the
 8 expert's testimony would assist the jury in drawing its own conclusion as to a fact at issue. *Id.*
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10 **III. Discussion**

11 **A. Motion to seal**

12 As a preliminary matter, the court will first address the government's motion to seal Exhibit
 13 1 to its response in opposition to defendant's instant motion. (ECF No. 78).
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15 A party seeking to seal a judicial record must demonstrate "compelling reasons supported
 16 by supported factual findings . . . sufficient to outweigh the public's interest in disclosure."
 17 *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). As the government
 18 argues in its motion, courts in this district have ruled that the "need to protect medical privacy
 19 qualifies as a 'compelling reason' for sealing records." *Steven City Broomfield v. Aranas*, No.
 20 3:17-cv-00683-MMD-WGC, 2020 WL 2549945, at *2 (D. Nev. May 19, 2020) (internal citations
 21 omitted).
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23 Exhibit 1 discusses the medical records of defendant. (ECF No. 65-1). Accordingly, the
 24 court grants the government's motion to seal Exhibit 1 to its response in opposition to defendant's
 25 instant motion. (ECF No. 78).
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1 B. Motion in limine

2 The government cites to the Local Rules, which denote that “[f]or trial-related motions . .
3 . such as motions in limine, such motions will not be considered unless the movant attaches a
4 statement certifying that the parties have participated in the meet and confer process” LCR
5 12-2. Defense counsel did not indicate that she met and conferred with the government prior to
6 filing defendant’s motion to exclude the government’s proposed rebuttal expert.
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8 The plain language of the rule compels the court to strike defendant’s motion. However,
9 defendant’s motion lacks merit regardless of LCR 12-2, as Dr. Hu is qualified to opine on Dr.
10 Jones-Forrester’s neuropsychological findings and his testimony is relevant under Federal Rule of
11 Evidence 702.
12

13 *i. Qualifications of Dr. Hu*

14 Defendant posits that the court should exclude the testimony of Dr. Hu, as he is not an
15 expert in the field of forensic neuropsychology. Defendant claims Dr. Hu lacks forensic
16 experience, has never testified in a criminal case, is not a psychologist of any type, and has no
17 expertise in conducting neuropsychological assessments. (ECF No. 72 at 4).
18

19 Most pertinent to his proposed testimony, defendant states that Dr. Hu’s “clinical
20 specialization is in the treatment response for dementia patients, not in the condition’s diagnosis
21 through neuropsychological testing.” (*Id.*).
22

23 The government counters by outlining Dr. Hu’s extensive experience in the fields of
24 geriatric medicine and major neurocognitive disorder, the latter of which is referred to as dementia.
25 (ECF No. 76 at 5). Dr. Hu has been a professor in the field of geriatric medicine since 2009, served
26 as an attending physician in the field of geriatric medicine since 2001, and received research grants
27 to study *dementia*. (*Id.* at 5-6) (emphasis added). The government also cites to a published
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1 academic paper of which Dr. Hu was a co-author, wherein he discussed implementing an
 2 assessment protocol related to identifying dementia. (*Id.* at 6).

3 The court finds Dr. Hu qualified to testify in this case. Defendant's only defense for failing
 4 to update his sex offender registration is that he allegedly suffers from dementia. Dr. Hu's
 5 testimony would assist a trier of fact in determining whether defendant's cognitive conditions
 6 prevented him from complying with his obligations to register as a sex offender. He has published
 7 an academic paper on dementia specifically. (ECF No. 76 at 6). Finally, defendant cites no
 8 authority to support the notion that Dr. Hu must have qualifications identical to those of Dr. Jones-
 9 Forrester in order to testify.

11
 12 *ii. Relevance of Dr. Hu's testimony*

13 There is little doubt that under Federal Rule of Evidence 702, Dr. Hu's testimony is relevant
 14 in assisting the jury with determining whether defendant's alleged dementia was severe enough to
 15 prevent him from updating his sex offender registration, the lone defense to his case.

16 The main argument proffered by defendant, outside of attempting to undermine Dr. Hu's
 17 well-established qualifications, appears to be simply that Dr. Hu disagrees with Dr. Jones-
 18 Forrester.

19 Under 18 U.S.C. § 2250, the government must prove that (1) defendant is required to
 20 register under SORNA; (2) defendant traveled in interstate commerce; and (3) defendant
 21 knowingly failed to register or update registration under SORNA. 18 U.S.C. § 2250(a). Most
 22 pertinent to this matter is the third element of the statute, which has a "knowingly" component that
 23 requires "the government to prove that a convicted sex offender knew of a registration and
 24 knowingly failed to register or update a registration." 18 U.S.C. § 2250(a)(3); *see United States*
 25 *v. Crowder*, 656 F.3d 870, 876 (9th Cir. 2011).
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1 In his motion, defendant avers that “it is not enough that a dissenting expert simply disagree
2 with another expert to make the dissenting expert’s opinion relevant.” (ECF No. 72 at 6). This
3 statement is conclusory, as defendant cites neither binding nor persuasive authority to buttress this
4 position.
5

6 Furthermore, the government has specifically outlined Dr. Hu’s proposed testimony. He
7 is not “simply disagreeing with Dr. Jones-Forrester.” Dr. Hu plans to testify that Dr. Jones-
8 Forrester did not properly diagnose defendant with dementia and that the cognitive level that
9 defendant demonstrated during the relevant time period was inconsistent with someone suffering
10 from severe dementia. (ECF No. 76 at 2).
11

12 Given Dr. Hu’s experience studying dementia and his breadth of knowledge of geriatric
13 medicine as a whole, the court reasons that allowing his testimony is paramount to understanding
14 the extent of defendant’s memory issues, and it would contravene principles of equity to disallow
15 him the opportunity to rebut Dr. Jones-Forrester’s expert testimony.
16

17 In sum, Dr. Hu’s testimony is relevant and admissible under FRE 702, as it will assist the
18 jury in determining whether defendant *knew* of his registration requirements at the time of his
19 offense, and whether he *knowingly* failed to register as a sex offender due to his dementia. *See*
20 *Crowder*, 656 F.3d at 876.
21

22 Finally, there is no need to conduct a *Daubert* hearing regarding Dr. Hu’s proposed expert
23 testimony. *See United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1189 (9th Cir. 2019) (holding
24 that district courts are not required to conduct *Daubert* hearings when evaluating the admissibility
25 of an expert witness).
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1 **IV. Conclusion**

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant Richard
4 Whittaker's motion *in limine* to exclude the government's proposed rebuttal expert or, in the
5 alternative, for a *Daubert* hearing (ECF No. 72) be, and the same hereby is, DENIED.
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7 IT IS FURTHER ORDERED THAT the government's motion to seal Exhibit 1 to its
8 response in opposition to defendant's instant motion (ECF No. 78), be, and the same hereby is,
9 GRANTED.

10 DATED February 16, 2024.

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13 UNITED STATES DISTRICT JUDGE
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